# HIGH COURT OF SIKKIM :

# GANGTOK

( Criminal Appellate Jurisdiction )

**Division Bench:** **HON'BLE MR. JUSTICE S. P. WANGDI, HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JJ.**

## Crl. A. No. 05 of 2014

**APPELLANT/ CONVICT** - Manna Das Bahun @ Manorath Upreti,

***Versus***

**RESPONDENT** - State of Sikkim

**Criminal Appeal u/S 374(2) of the Code of Criminal Procedure, 1973.**

**Appearance** :

Mr. S. P. Bhutia, Advocate for the Appellant/Convict.

Mr. J.B. Pradhan, Public Prosecutor with Mr. S.K. Chettri, Assistant Public Prosecutor for the State – Respondent.

## J U D G M E N T

**(11.06.2015)**

***Following Judgment of the Court was delivered by MEENAKSHI MADAN RAI, J.***

***1.*** This Appeal is directed against the Judgment and Order of Sentence passed by the Learned Judge, Fast Track Court at Gangtok in Sessions Trial (Fast Track) Case No. 53 of 2013, State of Sikkim

Vs. Manna Das Bahun @ Manorath Upreti on 28.02.2014. The Appellant was convicted under Section 376 IPC, 1860 and sentenced to undergo Simple Imprisonment for 7 (seven) years and to pay a fine of Rs.500/-(Rupees five hundred) only, with a default clause of imprisonment.

***2.*** It was put forth by Learned Counsel for the Appellant/Convict, *inter alia*, that the Prosecution has failed to prove its case against the Appellant/Convict beyond reasonable doubt as witnesses furnished by the Prosecution had given contradictory and improved versions of the incident and the Victim herself did not support the case of the Prosecution. That, under cross-examination she has admitted that the Appellant/Convict did not abuse her or sexually assault her. As per her evidence during the time of the alleged incident, the wife of the Appellant/Convict and his sons and daughters were also present. If this be true, it cannot be believed that the Appellant/Convict committed the offence in the presence of his family members.

***3.*** In addition to the above, Learned Counsel for the Appellant/Convict urged that PW-20, the Gynaecologist, who examined the Victim has admitted that injuries reflected in Exb.-24, (the Medical Report of the Victim) can also be caused by a fall. PW-20 has further admitted that at the time of the examination of the Victim, she was not of a definite opinion that the injuries which she had examined were due to sexual abuse and that if there was penile

penetration by an adult on a child of 3 years, then there would be profuse bleeding with excruciating pain.

***4.*** That, the I.O. in his evidence admitted that as the Victim was a minor, he could not enquire from her about the facts of the case but PW-2 her mother, had told the I.O. PW-23, that the Appellant/Convict had only committed *"Dur Beuhar"* on her minor daughter and the allegation of sexual assault had not been made against the Appellant/Convict. Moreover, PW-25 the Medico Legal Expert while examining the Appellant/Convict had not conducted any potency test on the Appellant/Convict and that the act of sexual intercourse by the Appellant/Convict on the Victim would have led to injuries, but no injuries were found on the private part of the Appellant/Convict. Thus, evidence led by the Prosecution is not cogent and reliable but vexed with contradictions and an improvement of the incident making the Prosecution case unreliable. Hence, it is prayed that the impugned Judgment and Order of Sentence convicting the Appellant/Convict under Section 376 of the IPC, 1860 be set aside. To buttress his submissions that the evidence of the Victim is not cogent or credible, Ld. Counsel has placed reliance on the following Judgments, i.e;

1. ***Tameezuddin alias Tammu vs. State (NCT of Delhi): (2009) 15 SCC 566.***
2. ***Vimal Suresh Kamble vs. Chaluverapinake Apal S.P. and Another : (2003) 3 SCC 175.***
3. ***2007 Cri. L. J. 1611 (Chhattisgarh High Court) in Bhushan Narayan Nai v. State of Madhya Pradesh.***

***5.*** *Per contra,* it was the argument of Learned Public Prosecutor, Mr. J. B. Pradhan, that the Judgment of the Learned Fast Track Court was a reasoned Judgment arrived at after analyzing the entire Prosecution evidence on record and the conviction had been arrived at after the Prosecution proved its case against the Appellant/Convict beyond a reasonable doubt. That, infact keeping in mind that the Victim was a child of only 3 ½ years the charge ought to have been framed under Section 376(2)(f) of the IPC, 1860 and the sentence infact enhanced as per the provision of law. That, this fact has been raised by the Prosecution in Crl. A. No. 28 of 2014 pending before this Court. Hence, the Appeal be dismissed. The Learned Public Prosecutor, Mr. J.B. Pradhan has cited a catena of decisions to substantiate his arguments which are as follows;

1. ***In Mohd. Imran Khan vs. State Government (NCT OF DELHI) : (2011) 10 SCC 192.***
2. ***Vijay alias Chinee vs. State of Madhya Pradesh : (2010) 8 Supreme Court Cases 191.***
3. ***2014(10) SCALE Munna vs. State of M.P.***
4. ***Viveswaran vs. State Rep. by S.D.M. : (2003) 6 SCC 73***
5. ***Datta vs. State of Maharashtra : (2013) 14 SCC 588.***
6. ***Mohd. Kalam vs. State of Bihar : (2008) 7 SCC 257.***
7. ***State of Himachal Pradesh vs. Suresh Kumar alias DC : (2009) 16 SCC 697.***

***6.*** We have heard the Learned Counsels at length and given careful consideration to both their submissions. We have also carefully perused and considered the evidence, documents on record and the Judgments relied on respectively by the learned opposing Counsels.

***7.*** What falls for consideration before this Court is whether the Learned Trial Court has passed the impugned Judgment and Order of Sentence correctly or whether the Appellant/Convict is entitled to an acquittal.

***8.*** For the said purpose, it would be essential to briefly state the facts of the case as placed before the Learned Trial Court.

***9.*** On 22.07.2012, Singtam Police Station FIR case No. 25 (07) 12 was registered against one Durga Prasad Ohli of Yangthang, East Sikkim under Section 448/307 of IPC, 1860 for alleged Trespass and attempting to Murder the Appellant/Convict. On conclusion of investigation, Charge Sheet was submitted against the said Durga Prasad Ohli. However, during the investigation of the said case, it also emerged that the Appellant/Convict had allegedly molested the minor Victim, aged about 3½ years, daughter of the said Durga Prasad Ohli on 03.03.2011 at the residence of the Appellant/Convict, which had led Durga Prasad Ohli to commit the above offence. The allegation of rape against the minor Victim was reportedly settled at the village

level, the Appellant and the Victim being relatives. Consequently, no report was lodged before the Police.

***10.*** Durga Prasad Ohli and the Appellant/Convict both as Petitioners, approached this Court under Section 482 of the CrPC, 1973 as a case had been registered against Durga Prasad Ohli at the Singtam Police Station under Section 307 of the IPC, 1860 allegedly for committing the said offence against the Appellant/Convict. The Court having heard the matter, being Crl. M. Case No. 19 of 2013 issued an Order on 29.08.2013 to the Singtam Police Station to register a case against the Appellant/Convict and investigate into the matter of alleged sexual assault of the minor.

***11.*** During the course of investigation, the Appellant/Convict was arrested. Investigation revealed that on a day in February, 2011 when the mother of the Victim was preoccupied with household chores, she realized after sometime that the Victim was missing from the house. She went in search of the Victim, who was returning home crying and was met enroute by her mother, PW-2. On enquiry by PW-2 as to the reason for her crying, PW-1, the Victim, pointed to the house of the Appellant/Convict. PW-2, then checked the Victim's underwear and found sperm like discharge on the thigh and private parts of the Victim and also noticed erosion of skin on the same parts. PW-2 took the Victim home and gave her a bath and thereafter confronted the Appellant/Convict at his home with regard to the sexual assault. The

Appellant/Convict, initially refuted the allegation but subsequently admitted his guilt and apologized for it, requesting PW-2 not to reveal the incident to any other person. PW-2, however, narrated the incident to her sister-in-law PW-11, who in turn told her husband Bed Prakash Sharma, who for his part confirmed the facts from PW-2 and the Victim PW-1. Thereupon, he called Roshan Upreti, son of the Appellant/Convict and narrated the incident to him. As they were all related and the Appellant/Convict's wife was ailing seriously, the matter was compromised with the drawing up of a Compromise Deed and on the understanding that the Appellant/Convict would be ostracised from the village society for three years.

***12.*** However, after 13 months, an application was submitted before the Gram Sabha Samiti by the Appellant/Convict's wife requesting them to lift the ostracism, which was objected to by the Victim's father, PW-18, who on being enraged with the suggestion, allegedly took a sharp edged weapon and went to the house of the Appellant/Convict to attack him, leading to the Criminal Case being lodged against him.

***13.*** On completion of the investigation, Charge Sheet was filed against the Appellant/Convict under Section 354/376 of the IPC, 1860 and against 5 others under Section 354/376/201/202/34 of the IPC, 1860.

***14.*** The Learned Trial Court framed charges against the Appellant/Convict under Section 376 of the IPC, 1860 while charge was framed against the others under Section 201/34 of the IPC and 202/34 of the IPC, 1860.

***15.*** On examination of 26 Prosecution witnesses, the Learned Court came to a finding that the Appellant/Convict was guilty of the offence under Section 376 of the IPC, 1860 and sentenced him as already detailed hereinabove while acquitting the others finding no evidence against them for the offences under which they were charged.

***16.*** Before the Learned Trial Court, the Victim was examined as PW-1 and was aged about 7 years by then. To test her competence to depose in Court, the Learned Trial Court put some questions to her. After the Victim rationally responded to the questions put to her, the Court was satisfied that she was capable of testifying and accordingly her evidence was recorded.

***17.*** Despite the incident having occurred about 3 years prior to the date of her evidence being recorded, she recollected the facts thereon and deposed that the Appellant/Convict sexually assaulted her. According to her *"My Phupaju took me inside the room of his house and took out his penis (susu-garne) and put the same into my vagina (susu-garne)."* Although, the Victim was subjected to gruelling cross-examination by the Learned Counsel for the Appellant giving her no

respite or empathy for her tender years, she has stated *"It is not a fact that I was insisted by my family members to depose against the Accused No. 1 that he has inserted his private part into my private part. It is not a fact that I had not stated to the police that the Accused No. 1 had inserted his private part into my private part."* Pausing here for a moment, it may be pointed out that the specific argument of the Appellant/Convict was that the Victim had under cross examination deposed that *"It is true that on the relevant day accused No. 1 neither abused me nor sexually assaulted me."* On this count, firstly, the age of the Victim is to be kept in mind. As the child was undisputedly 3 years at the time of the offence, she was obviously not in a position to comprehend as to what "sexual assault" would be. The fact that her evidence-in-chief, is to the effect that the Appellant/Convict had inserted his genital into her genital and the evidence being cogent and credible, suffices to establish the fact that the offence was indeed committed by the Appellant/Convict, although, she has not been able to put a nomenclature on the offence. Further, the context in which she has stated that the act was committed by the Appellant/Convict when his wife and sons and daughter were present, has to be interpreted in its correct perspective and the meaning therein should not be lost in translation from the Nepali vernacular to English. It is obvious, what she meant by the above statement is that the family of the Appellant/Convict was in the house when the offence was committed

but were not present with the Appellant/Convict. She has no where stated that they witnessed the offence.

***18.*** The evidence of PW-1 is supported by evidence of PW-2, her mother, who has stated that on the relevant day she was engaged in household chores. After sometime, she realised that her child PW-1 was missing from her house and went in search of her. She found PW-1 returning home from the house of the Appellant/Convict crying. On enquiry PW-1 narrated to PW-2 the incident of the Appellant/Convict having inserted his genital into the genital of PW-1. PW-2 then inspected the private part of PW-1 and found *"……*.*some sticky substance like sperm on the private parts of my daughter. I then took my daughter to my house and cleaned her private parts with water. I also cleaned the body of my daughter with water."* The witness has further stated that thereafter she confronted the Appellant/Convict about the incident, who initially denied it but on PW-2 threatening to bring the wearing apparels of PW-1, the Appellant/Convict admitted the offence and asked to be excused for the said offence. He infact requested PW-2 not to relate the incident to any other person. PW-2, however, informed her sister-in-law, PW-11. The Appellant/Convict and his sons prepared the *'Akarnama Patra'* Exbt. 6, in their house but she remained unaware of the contents therein. The evidence given by this witness could not be demolished in cross examination despite

the same having being conducted incisively by the Learned Counsel for the Appellant/Convict.

***19.*** Although, it appears that the Victim was not bleeding from her genital when PW-2 checked the same after the incident and no Doctor examined the Victim after the incident, however, the evidence of PW-1 and PW-2 have been unwavering so far as the occurrence of the offence committed by the Appellant/Convict is concerned.

***20.*** In this regard, it may be stated that:-

> *"The definition of "rape" in Sec. 375 of the Indian Penal Code being entirely on the basis of common law, the law as to the meaning of "sexual inter-course" and "penetration" has been no different from that in England. In Natha v. Crown, which refers to and relies upon in support of a Bombay High Court judgment in Reg. v. Feirol, it was held that to constitute penetration it must be proved that some part of the virile member of the accused was within the libia (sic) of the pudendum of the woman, no matter how little. The law admittedly remains the same till date."*
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> (See Dr. Hari Singh Gaurs, Penal Law of India, 11th Edition, Page No. 3608)

The principle enunciated above applies to the instant case, added to which it has to be borne in mind that PW-2 has specifically stated *"when I enquired and inspected the private part of my daughter……. I noticed some reddish mark on her private part"*, leading to the unerring conclusion that there was penetration however little.

***21.*** It was also the argument of Learned Counsel for the Appellant/Convict, that PW-2 had infact only told the police that the Appellant/Convict had committed *"Dur beuhar"* on the Victim. On

going through the evidence of PW-2, it is evident that she informed PW-11 about the incident. PW-11 for her part has supported this evidence in as much as she has stated in her evidence-in-chief *"On the same month my sister-in-law Binita Sharma told me that accused No. 1 (Manna Das Bahun @ Manorath Upreiti) had committed "kukarma" to her daughter Ms. A. It is also reported the said kukarma occurred in the house of the accused Manna Das Bahun @ Manorath Upreiti"*. PW-11 then narrated the same to her husband. Under cross-examination, she admitted that before the Police. She had stated that PW-2 had told her that the Appellant/Convict had committed *"Dur beuhar"*.

***22.*** One cannot over emphasise on the fact that society in the rural areas are conservative and unsophisticated and will not use the exact nomenclature to describe a sexual offence. When a male commits a sexual offence on a girl, the words employed to describe the offence would be with subtle words such as "*kukarma*" (bad action) and "*Dur beuhar"* (misbehaviour). It is to be understood in the context in which it is used and one cannot resort to hyper technicalities to defeat the ends of Justice.

***23.*** The fact that semen like substance was found on the Victim was not demolished under the cross-examination of PW-2, apart from which the evidence of PW-1, a mere child has remained consistent in connection with the incident. When the Victim is herself clear about

what transpired between the Appellant/Convict and herself, there is no requirement for this Court to look for corroboration from the evidence of any witness. The Hon'ble Apex Court in ***State of Punjab vs. Gurmit Singh and Others : 1996 SCC (Cri) 316*** held as follows:-

> *"The testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some* ***assurance*** *of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape……."*

In the case at hand, there is no reason for a minor child of three years to narrate an incident out of thin air, when she cannot even understand its import. No motive has been attributed to PW-2 or PW-18 to make a false allegation against the Appellant/Convict by tutoring the Victim.

***24.*** PW-1 has narrated unwaveringly, that the Appellant/Convict accosted her, when she was accompanying her brother to his school and took her to his home where he committed the heinous offence. Her evidence inspires confidence being consistent and there is no reason for this Court to doubt her testimony.

***25.*** The fact that an "*Akarnama Patra"* was prepared in connection with the instant case, in the house of the Appellant/Convict along with his sons is apparent from the evidence of PW-2. PW-18, the Victim's father identified Exbt.6 as the "*Akarnama Patra*" prepared by the Appellant/Convict and his sons which was signed by the Appellant/Convict and accused Pramod Sharma and Shanti Sharma, son and daughter of the Appellant/Convict. Not being satisfied with the contents of Exbt.6, he tried to move the nearest Thana to report the incident. However, Pramod Sharma, the son of the Appellant/Convict requested him not to narrate the incident to his mother as she was hospitalized. PW-18 himself also did not report the matter to the Police, due to the fact that the Appellant/Convict's wife was his paternal aunt (*phupu*) and she had cared for him during his childhood. The facts of execution of Exbt. 6 was not demolished under the cross-examination of this witness.

***26.*** A perusal of Exbt. 6, indicates that the Appellant/Convict has admitted that he had repeatedly misbehaved with minors and had committed "*Dur beuhar"* and raped them. It is evident that PW-18

was not satisfied with the contents as the incident which occurred with PW-1 was not specifically mentioned therein.

***27.*** In a bid to exonerate the Appellant/Convict from the offence, attempts were made to foist the offence on one Bishal, an Adivasi boy working in the house of the Appellant/Convict but this could not be established by an iota of evidence.

***28.*** In the end result, it is found that the evidence of PW-1 & PW-2 leads to the inevitable conclusion that the Appellant/Convict had committed the offence of Rape on the minor Victim.

***29.*** Since Rape is not only a physical assault but also traumatises the victim mentally, this Court is undoubtedly alive to its responsibility and conscious that sexual offences have to be dealt with sensitivity towards the victim and severity of penalty towards the accused. Considering the relation between the Appellant/Convict and the Victim and the age of the Victim, when she had to experience the abhorrent act of the Appellant/Convict, there is absolutely no reason to take a lenient view in the matter of sentence or have misplaced sympathy in consideration of his age being about 70 years. It has indeed to be a deterrent sentence bearing in mind that innocent children are becoming victims of depraved adults.

***30.*** While considering the question of sentence, it is pertinent to note that during the course of hearing of this case, it was revealed that

the Victim was less than 12 years of age. Although, the Learned Trial Court had taken note of this fact, as apparent from a perusal of the charge framed against the Appellant/Convict but nevertheless proceeded to erroneously frame charge under Section 376 IPC, 1860 only, instead of doing so under Clause (f) of Sub-Section (2) of Section 376 IPC, 1860. It is relevant to note that by filing Crl. A. No. 28 of 2014 under Sub-Section (3) of Section 377 Cr. P.C., 1973 the State of Sikkim sought for enhancement of sentence against the Appellant/Convict on this very ground.

***31.*** The Appeals had been heard together and upon consideration of the evidence and the materials on record, this Court allowed Crl. A. No. 28 of 2014 duly altering the charge from Section 376 IPC, 1860 to Clause (f) of Sub-Section (2) of Section 376 IPC, 1860 thereby enhancing the sentence against the Appellant/Convict to rigorous imprisonment for a term of 10 (ten) years with a fine of Rs.20,000/- (Rupees twenty thousand) only, in default of payment thereof he was directed to undergo further simple imprisonment of 5 (five) years.

***32.*** In view of the above, the Appeal stands dismissed with the charge being altered to one under Clause (f) of Sub-Section (2) of Section 376 IPC, 1860 from Section 376 IPC, 1860.

***33.*** Resultantly, the Appellant/Convict is sentenced to undergo the sentence passed in Crl. A. No. 28 of 2014.

***34.*** Compensation amount of Rs.1,00,000/- (Rupees one lac) only, be paid to the Victim in terms of Notification No. 78/Home/2013 dated 03.12.2013. The Sikkim State Legal Services Authority shall take necessary steps in this regard.

***35.*** Records of the Learned Trial Court be remitted forthwith.

Sd/-
**( Meenakshi Madan Rai )**
**Judge**
11.06.2015

Sd/-
**( S. P. Wangdi )**
**Judge**

11.06.2015

Approved for reporting : Yes/~~No~~
Internet : Yes/~~No~~

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